Supreme Court, U.S.
FILED

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In The
Supreme Court of The United States
October Term 1997

KEVIN W. LANDBERG, et al.
Petitioners,

v.

WILLIAM E. DUFFY, et al.
Respondents.

Petition For A Writ Of Certiorari To The United States Court of Appeals For The Eighth Circuit

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PETITION FOR WRIT OF CERTIORARI

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86 pp

QUESTION PRESENTED FOR REVIEW

Whether a dishonored check is a "debt" under the Fair Debt Collection Practices Act 15 U.S.C. § 1692a-1692o.

LIST OF ALL PARTIES

Petitioners

Kevin W. Landberg, Attorney at Law; New Concepts Business Services, sued as New Concepts Business Services, Inc., a Minnesota Corporation.

Respondents

William E. Duffy, Susan M. Quaderer, and Dennis G. Hacken.

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Journal of the House,
52nd day p. 2510 (1983) 4

OPINIONS BELOW

The opinion and judgment of the United States Court of Appeals for the Eighth Circuit, reported at 133 F.3d 739, Pet. Apdx A - 1. The orders of the district court upon which this appeal is based are found at Pet. Apdx B - 13.

JURISDICTION

The judgment of the United States Court of Appeals for the Eighth Circuit was entered on January 20, 1998. On January 29, 1998 Petitioner timely filed a Petition for Rehearing. The court below entered an order (reprinted in at Apdx A - 1) denying the petition on February 26, 1998. This petition is filed within (90) days of that date. The jurisdiction of this Court to review the judgment on petition for certiorari rests upon Section 1254(1) of the Judicial Code (28 U.S.C. § 1254(1)).

STATUTES INVOLVED

The relevant statutory provision is 15 U.S.C. §1692a et seq.

STATEMENT OF THE CASE

Plaintiffs wrote bad checks. Plaintiff Duffy wrote a $25.00 bad check in June 1993. Plaintiff Quaderer wrote a $24.40 bad check on September 12, 1994. Plaintiff Hacken wrote a $11.38 bad check in March 1991. Defendant New Concepts sent each plaintiff a letter including the statutory requirements mandated by Minn Stat § 332.50 that they all ignored. Plaintiffs became liable for the statutory amounts 30 days after receiving the statutory mandated demand that New Concepts sent. Defendant Landberg sent his letter to Duffy two years after he wrote the bad check; he sent his letter to Ms. Quaderer one year after she wrote her bad check and to Mr. Hacken four years after he wrote his bad check. Plaintiffs brought suit alleging FDCPA violations.

ARGUMENT

This court should reverse the appellate court's finding that dishonored checks are "debts" within the meaning of the FDCPA, and the collection of dishonored checks, therefore is governed by the FDCPA. First, Congress never intended dishonored checks to be "debts" under the FDCPA. Legislation including dishonored checks was never enacted. More importantly, the Senate banking committee has stated that a bad check is not a debt under the FDCPA. Additionally, the FDCPA only applies to debts contracted by consumers.

Furthermore, it is impossible Congress considered Minn. Stat § 332.50 in its deliberations. Second, the commission of a crime is not a "debt" under the FDCPA, and since issuing a worthless check is a crime, it cannot also be a debt because of state constitutional prohibitions against debtor's prisons. Third, payment by check is not covered by the FDCPA because it is a cash transaction. Fourth, the FDCPA does not govern liability based on torts or crimes.

I. Congress never in ended dishonored checks to be "debts" under the FDCPA .

A. The provisions inferring that dishonored checks were to be included as "debts" under the FDCPA were never enacted.

The provisions inferring that dishonored checks were to be included as "debts" under the FDCPA were never enacted. See Senate Report 95-382 reprinted in 1977 U.S. Code Cong. & Admin News at 1696. In fact, the Senate Banking Committee has concluded that a check in not a debt under the FDCPA. Fair Debt Collection Practices Act: Hearings on S.1405 Before the Senate Comm. on Commerce, (1997).

B. The 1977 bill applied only to debts contracted by consumers for personal., family., or household purposes.

The 1977 bill applied only to debts contracted by consumers for personal, family, or household purposes. The key word is "contracted". A dishonored check lacks consideration, and is therefore not a debt contracted by a consumer for personal, family, or household purposes. Where there is a lack of consideration no valid contract is ever formed Chalmers v. Kanawye, 544 N.W. 2d 795 (Minn. App. 1996) citing Franklin v. Carpenter 244 NW2D 492 495 (1976).

C. Plaintiffs committed crimes., namely bouncing checks.

Plaintiffs committed crimes, namely bouncing checks.[1] Their collective criminal behavior does not constitute the

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[1] Issuance of a bad check violates Minnesota criminal statutes. Minn Stat. §§ 609.535 provides that "[w]hoever issues a check which, at the time of issuance, the issuer intends shall not be paid, is guilty of issuing a dishonored check and may be sentenced as provided in subdivision 2a. In addition, restitution may be ordered by the court." Further, [a] person who is convicted of issuing a dishonored check under subdivision 2 may be sentenced as follows: "(1) to imprisonment of not more than 90 days or to payment of a fine of not more than $700, or both, if the value of the dishonored check, or checks aggregated under paragraph (b), is not more than $250."

Congressional mandated intent that "this bill only applies to debts contracted by consumers" because the commission of a crime is definitely not a debt contracted by a consumer. Rather it is the price they pay for committing crimes.

D. The liability imposed by Minn. Stat. § 332.50 is not a contract.

Likewise, the liability imposed by Minn. Stat. 332.50[2] is not a contract. Plaintiffs did not contract for penalties provided by law. Rather the liability is the direct result of a statutory violation.

E. It Is Impossible That The FDCPA Legislative History Considered Minn. Stat. 332.50.

The FDCPA was not meant to apply to Min . Stat. 332.50. First, the FDCPA was passed in 1977. Minn. Stat. 332.50 was enacted in 1983. The statute passed unanimously. In the State Senate, the vote was 61-0 in favor

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[2] This statute creates certain rights of recovery for the holder of a dishonored check, above and beyond any preexisting contractual or statutory right to receive the face value of it. In re Anderson, 181 B.R. 943 (Bkrtcy. D. Minn 1995). The Minnesota Legislature clarified the statute and deleted section 2(c). Laws of Minnesota Ch. 157 Sec.66 pp. 997-999 (1997). (SEE Apdx C - 57 for Minn. Stat. § 332.50)

of the statute. Journal of the Senate 52nd day p. 2510 (1983). In the vote was 131-0. Journal of the House, 52nd day p. 2510 (1983). There is no way that Congress could have included a law that was nonexistent to be within the FDCPA.

Second, Congress never attempted to include statutory liabilities within the FDCPA.

II. The Commission of a crime is not a debt under the FDCPA, and since issuing a worthless check is a crime, it cannot also be a debt because of state constitutional prohibitions against debtors prisons.

A. Payment obligations arising from crimes are not covered by the FDCPA.

Payment obligations arising from crimes are not covered by the FDCPA. Liability for shoplifting is not a debt within the FDCPA. See Shorts v. Palmer, 155 F.R.D. 172, 174-75 (E.D. Ohio 1994); Payless Drug v. Brown , 690 P.2d 45, 47 (Or. 1985). Shoplifting and tendering a dishonored check both constitute theft pure and simple. That is why they are not subject to the FDCPA.

B. Imprisonment for debt prohibited.

Imprisonment for debt is prohibited. Ala. CONST.

art. I, 5 20; Alaska CONST. art. I, § 17; Ariz. CONST. art. II, § 18; Ark. CONST. art. II, § 16; Cal. CONST. art. I, § 10; Colo. CONST. art. 11, 5 12; Fla. CONST. art I, § 11; Ga. CONST. art. I, § 23; Hawaii CONST. art. I, § 19; Idaho CONST. art. I, § 15; Ind. CONST. art. I, § 22; Iowa CONST. art. I, § 19; Kan. CONST. art. 16; Ky. CONST. art. S*** 18; Md. CONST. art. III, § 38; Mich. CONST. art . I, 21; Minn. CONST. art. I, § 12; Miss. CONST. art. III, § 30; Mo. CONST. art. 1, § 11; Mont. CONST. art. II, § 27; Neb. CONST. art. I, § 20; Nev. CONST. art. 1, § 14; N.C. CONST. art. I, § 28; N.D. CONST. art. I, § 14; N.J. CONST. .art I, § 12; N.M. CONST. art II, § 21; Ohio CONST art. I, § 15; Okla. CONST. art. 11,13; R.I. CONST. art. I, § 11; S.C. CONST. art. I, § 19; S.D. CONST. art. 6 § 15; Tenn. CONST. art. I, § 18; Texas. CONST. art I, § 18; Utah CONST. art. I, § 16; Wash. CONST. art. 1, § 17; Wis. CONST. art. I, § 16; Wyo. CONST. art I, § 5.

Yet, issuing a bad check is a crime in all fifty states. ALA. CODE 13A-9-13.1 (1994 & Supp.1997); ALASKA STAT. § 11.46.280 (1996); ARIZ. REV. STAT. ANN. § 13-1807 (1989 & Supp. 1997); ARK. STAT. ANN. 5-37-302 (1997); CAL. PENAL CODE § 476a (West 1988 & Supp. 1998); COLO. REV. STAT. §18-5-512 (1990); CONN. GEN. STAT. ANN. § 53a-128 (1994); DEL. CODE. ANN. tit. 11, § 900 (1995 and Supp. 1996); FLA. STAT. ANN. § 832.05 (West 1994 & Supp. 1998); GA. CODE ANN. § 16-9-20 (1996); HAWAII REV. STAT. § 708-857 (1994); § 18-3106 (1997); ILL. ANN. STAT. ch. 720, § 17-1 (Smith-Hurd

1993); IND. CODE ANN. § 35-43-5-5 (West 1998); IOWA CODE § 714.1 (1993 & Supp. 1998); KAN. STAT. ANN. § 21-3707 (1995 & Supp. 1997); KY. REV. STAT. § 514.040 (1990 & 1996); LA. REV. STAT. ANN. § 14:71 (West 1992); ME. REV. STAT. ANN. tit. 17-A §708 (1983 & Supp. 1997); MD. ANN. CODE art. 27, § 141 (1996); MASS. GEN. LAWS ch. 266 § 37 (West 1990); MICH. COMP. LAWS ANN. § 750.131 (West 1991); MINN STAT. § 609.535 (1995); MISS. CODE 97-19-55 (1994); MO. REV. STAT. § 570.120 (Supp. 1998); MONT. CODE ANN. § 45-6-316 (1997); NEB. REV. STAT. § 28-611 (1995); NEV REV. STAT. § 205.130 (1997); N.H. STAT. ANN. § 638:4 (1996); N.J. STAT. § 2C:21-5 (1995); N.M. STAT. ANN. § 30-36-4 (1997); N.Y. PENAL LAW § 190.05 (McKinney 1988); N.C. GEN. STAT. § 14-107 (1995); ND. CENT. CODE § 6-08-16 (Supp. 1997); OHIO REV. CODE ANN. § 2913.11 (Page 1997); OKL. STAT. ANN. tit. 21, § 1541.1 (West 1983); OR. REV. STAT. § 165.065 (1990); 18 PA. CONST. STAT. ANN. § 4105 (Purdon Supp.1997); R.I. GEN. LAWS § 19-9-24 (Supp. 1997); S.C. CODE ANN. § 34-11-60 (1987 & Supp. 1997); S.D. CODIFIED LAWS ANN. § 22-41-1 (1988 & Supp. 1997); TENN. CODE ANN. § 39-14-121 (1997) TEXAS CODE ANN. (1994 & Supp. 1997); UTAH CODE ANN. § 76-6-505 (Supp. 1997); VT. STAT. ANN. TIT. 13, § 2022 (Supp. 1997); VA. CODE § (1996); WASH. REV. CODE ANN, § 9A.5 6060 (1988); W. VA CODE § 6-1-39 (Supp. 1997); WIS. STAT. ANN. § 943.24 (West 1996); WYO. STAT. § 6-3-702 (1997);

Congress did not intend to make a bad check a debt under the FDCPA because to do so would make state criminal bad check statutes unconstitutional because imprisonment for debt is prohibited.

III. Payment By Check Is Not Governed By The FDCPA Because It Is A Cash Transaction.

A. Payment by check constitutes a cash transaction., not a credit transaction.

Payment by check constitutes a cash transaction, not a credit transaction. This is evident not only from common experience but from state statutes and case law. Under the Uniform Commercial Code, a check is a negotiable instrument which may be immediately be presented for payment. This distinction is critical. In Minnesota, a check, which is an order for payment payable upon demand, is different from a note, which is a promise to pay. A note evidences a credit transaction. A check does not. Minn. Stat. § 336.3-104. Other courts hold that checks are equivalent to cash under the Uniform Commercial Code except when they are post-dated. See e.g. Stock Clearing Corp., Inc. v. Weis Securities Inc., Inc., 542 F.2d 850, 845 (2d Cir. 1976) (payment by check does not convert a cash sale to a credit sale if a cash sale is intended because checks are used "in lieu of cash"); In re Helms Venner Corp., 287 F.Supp. 840, 844 (W.D. Va. 1968)

(same), Wilson v. Lewis, 106 Cal. App. 802, 165 Cal. Rptr. 396, 399 (1980) (a check is "payable on demand" unless it is postdated.)

B. Because a check is equivalent to cash., collection of plaintiffs, bad checks is not governed by the FDCPA, and this court should reverse the appellate court.

Because a check is equivalent to cash, collection of plaintiffs, bad checks is not governed by the FDCPA, and this court should reverse the appellate court.

When consumers pay by check, they are buying with cash, not credit. This distinction also explains why in most states, writing a check is a crime whereas defaulting on a loan payment is a breach of contract.

IV. The FDCPA does not govern liability based on torts or crimes.

A. Courts consistently hold that payment obligations arising from torts or crimes are not covered by the FDCPA because they do not arise from consumer transactions.

Courts consistently hold that payment obligations arising from torts or crimes are not covered by the FDCPA because they do not arise from consumer transactions. For

example, in Zimmerman v. HBO Affiliate Group., 834 F.2d 1163 (3rd Cir. 1987), the defendant tried to collect a $300 tort settlement from the plaintiff, who allegedly had pirated HBO television signals. The court found that Congress did not intend the FDCPA "to protect against . . . abusive practices in collecting tort settlements from alleged tortfeasors . . . ." 834 F.2d at 1168. The court granted the defendant's motion to dismiss because "[n]o offer or extension of credit [was] asserted in the complaint . . . ." Id. at 1169. Other courts similarly have held that liability for shoplifting does not arise out of a consumer transaction, but out of criminal statutes. See Shorts v. Palmer, 155 F.R.D. 172, 174-75 (E.D. Ohio 1994); Payless Drug v. Brown, 690 P.2d 45, 47 (Or. 1985). Plaintiffs' bad checks are squarely outside of the FDCPA's coverage and this court should affirm.

B. Under Minnesota law, plaintiffs bad checks were torts or crimes.

Plaintiffs wrote bad checks. Plaintiff Duffy wrote a $25.00 bad check in June 1993. Plaintiff Quaderer wrote a $24.40 bad check on September 12, 1994. Plaintiff Hacken wrote a $11.38 bad check in March 1991. Defendant New Concepts sent each plaintiff a letter including the statutory requirements mandated by Minn. Stat. § 332.50 that they all ignored. Plaintiffs became liable for the statutory amounts 30 days after receiving the statutory mandated demand that New Concepts sent.

C. Plaintiffs' obligations to pay were predicated on statutory violations and torts.

Plaintiffs' obligations to pay were predicated on a statutory violations and torts, just as liability in Zimmerman was predicated on a tort. Their statutory obligations began years before any alleged FDCPA violations occurred.

D. The Theft Of Merchandise Is Not A Transaction Under The FDCPA.

A "transaction" is "that which is transacted or completed; specifically, a business deal." Webster's, at 1937; accord, Black's at 1496 ("Act or transacting or conducting any business"). Here, both transactions and business deals were nonexistent. Plaintiffs received merchandise without paying for it, which is certainly not a transaction. It is out and out theft. For plaintiffs to claim that a transaction exists is as absurd as breaking into a store, stealing the merchandise, getting caught with it and suing the police under the FDCPA alleging that a transaction occurred.

V. CONCLUSION

This court should reverse the appellate court's finding that dishonored checks are "debts" within the meaning of the FDCPA, and the collection of dishonored checks, therefore is

governed by the FDCPA. First, Congress never intended dishonored checks to be "debts" under the FDCPA. Legislation including dishonored checks was never enacted. More importantly, the Senate banking committee has stated that a bad check is not a debt under the FDCPA. Additionally, the FDCPA only applies to debts contracted by consumers. Furthermore, it is impossible that Congress considered Minn. Stat. § 332.50 in its deliberations. Second, the commission of a crime is not a "debt" under the FDCPA, and since issuing a worthless check is a crime, it cannot also be a debt because of state constitutional prohibitions against debtor's prisons. Third, payment by check is not covered by the FDCPA because it is a cash transaction. Fourth, the FDCPA does not govern liability based on torts or crimes.

For the foregoing reasons, the Petition for Writ of Certiorari should be granted.

Respectfully Submitted,

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612-891-5751

Counsel for Petitioners

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

ORDER DENYING REHEARING
FILED, FEBRUARY 26, 1998
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OPINION
FILED, JANUARY 20, 1998
PAGE 2

UNITED STATES COURT OF APPEALS
FOR THE EIGHT CIRCUIT

No. 97-1560 MNST

William E. Duffy, et al.,	*	
Appellants	*	
	*	Appeal from the
vs.	*	United States District
Kevin W. Landberg, etc.,	*	Court for the District
et al.,	*	of Minnesota
Appellees.	*	

The petition for rehearing filed by appellees Kevin W. Landberg and New Concepts Business Services has been considered by the court and is denied.

February 26, 1998

Order Entered at the Direction of the Court:
/s/ Michael E. Gans
Clerk, U.S. Court of Appeals, Eighth Circuit

United States Court of Appeals

FOR THE EIGHTH CIRCUIT

No. 97-1560

William E. Duffy,	*	
	*	
Plaintiff - Appellant,	*	
	*	
v.	*	
	*	
Kevin W. Landberg,	*	
Attorney at Law;	*	
New Concepts Business	*	
Services, sued as New	*	
Concepts Business Services,	*	
Inc., a Minnesota	*	
Corporation,	*	
	*	
Defendants - Appellees.	*	Appeals from the United
	*	States District Court for
----------	*	the District of Minnesota.
	*	
Susan M. Quaderer,	*	
	*	
Plaintiff - Appellant,	*	

v. *

*

Kevin W. Landberg, *
Attorney at Law; *
New Concepts Business *
Services, sued as New Concepts *
Business Services, Inc., a *
Minnesota Corporation, *

*

Defendants - Appellees *

*

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*

Dennis G. Hacken, *
Plaintiff - Appellant, *

*

v. *

*

Kevin W. Landberg, Attorney *
at Law; New Concepts Business *
Services, Inc.,a Minnesota *
Corporation, *
Defendants - Appellees *

*

*

_____ *

*

Federal Trade Commission, *
Amicus on Behalf of *
Appellant *

Submitted: November 20, 1997
Filed: January 20, 1998

Before BOWMAN, MURPHY, Circuit Judges, and CONMY,[1] District Judge.

MURPHY, Circuit Judge.

William E. Duffy, Susan M. Quaderer, and Dennis G. Hacken sued Kevin W. Landberg and New Concepts Business Services, Inc. ("New Concepts") for abusive practices in seeking to collect payment for dishonored checks in violation of the Fair Debt Collection Practices Act (FDCPA), 15 U.S.C. §§ 1692 et seq., and the Minnesota Prevention of Consumer Fraud Act (Consumer Fraud Act), Minn. Stat. § 325F.68-69. The district court granted defendants' motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(6), holding that plaintiffs' complaints failed to state a claim under either statute. Plaintiffs appeal from that part of the judgment dismissing

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[1]The Honorable Patrick A. Conmy, United States District Judge for the District of North Dakota, sitting by designation.

their claim under the FDCPA. We reverse and remand.

After Duffy and Quaderer wrote checks to Snyder Drug Stores for $25 and $24.40, respectively, and Hacken wrote a check to MGM Liquor for $11.38, all three checks were returned for insufficient funds. New Concepts then sent letters to the check issuers on behalf of the merchants seeking to collect the face amount of each check and a $20 service charge. Plaintiffs later received unsigned letters on the letterhead of "Kevin W. Landberg, Attorney at Law," which were mailed by New Concepts but not reviewed in advance by Landberg. These letters stated Landberg had been retained by the merchants concerning the dishonored checks and demanded payment of the amount of the check plus a service charge, collection fee, interest, and civil penalty. The letters indicated that each of the additional charges was assessed under "Minnesota state law" but offered to settle for a lower total still well in excess of the dishonored checks. They threatened "further legal action" in the event of nonpayment to recover all sums demanded, plus all court and service of process costs, attorney fees, and "such other remedy as the court may grant."

Plaintiffs each filed suit against Landberg and New Concepts for abusive debt collection practices in violation of the FDCPA. They alleged that defendants falsely represented the amount due, see 15 U.S.C. § 1692e(2)(A), unlawfully attempted to collect an inflated interest payment, civil penalty, and collection fee, see 15 U.S.C. § 1692f(1), falsely represented that the source of the second collection letter was

an attorney when Landberg had not seen it, see 15 U.S.C. § 1692e(3), (9), and falsely threatened legal action, see 15 U.S.C. § 1692e(5). Plaintiffs also claimed that defendants engaged in deceptive practices in violation of the Minnesota Consumer Fraud Act. Since all three actions alleged similar conduct by Landberg and New Concepts and raised identical legal issues, they were consolidated for consideration of dispositive motions.

Landberg filed a motion to dismiss the complaints on behalf of the defendants who argued that their efforts to collect on dishonored checks were not governed by either the FDCPA or the Consumer Fraud Act. The district court noted that the FDCPA does not specify the type of transaction that may give rise to a consumer debt, and it went on to hold that the transaction must involve an offer or extension of credit to a consumer in order to be covered by the statute, citing Zimmerman v. HBO Affiliate Group, 834 F.2d 1163, 1168 (3d Cir. 1987). Since the court determined that payment by check for consumer goods is not a credit transaction, it concluded that the obligation resulting from the subsequent dishonor of the check was not a debt within the meaning of the FDCPA. It dismissed the complaints because the challenged debt collection practices were not covered by the consumer protections in the FDCPA and the Consumer Fraud Act did not apply since no fraud in the sale of merchandise was alleged.

Dismissals under Rule 12(b)(6) are reviewed de novo. See First Commercial Trust Co. v. Colt's Mfg. Co., 77 F.3d 1081,

1083 (8th Cir. 1996). The allegations in the complaint must be treated as true and must be construed in a plaintiff's favor. See Scheuer v. Rhodes, 416 U.S. 232, 236 (1974); United States v. Mississippi, 380 U.S. 128, 143 (1965). Dismissal is proper only when the complaint on its face reveals "some insuperable bar to relief." Frey v. City of Herculaneum, 44 F.3d 667, 671 (8th Cir. 1995).

The FDCPA permits consumers who have been subjected to unfair practices by third-party debt collectors to recover damages, attorney fees, and costs. See 15 U.S.C. § 1692k(a). The purpose of the statute is "to eliminate abusive debt collection practices" and "to insure that those debt collectors who refrain from using [such] practices are not competitively disadvantaged." 15 U.S.C. § 1692(e) The statute defines "debt" as:

> any obligation or alleged obligation of a consumer to pay money arising out of a transaction in which the money, property, insurance, or services which are the subject of the transaction are primarily for personal, family, or household purposes, whether or not such obligation has been reduced to judgment.

15 U.S.C. § 1692a(5)

Appellants argue that a dishonored check fits within the plain language of this definition, that the legislative history

supports this conclusion, and that the district court erred in concluding that the statute does not cover third-party collection of a dishonored check.[2] Landberg and New Concepts assert that the district court and the Third Circuit in Zimmerman were correct in determining that the type of transaction meant in the definition of debt in the FDCPA is an offer or extension of credit and that the statute therefore does not apply to their collection activities.

The FDCPA is clearly worded and broadly defines debt as "any obligation" to pay arising out of a consumer transaction. It therefore can be applied to appellants' dishonored checks.[3] Their payment obligations arose from transactions for personal or household goods at a drug and a liquor store. Nothing in the statutory definition suggests that the only consumer transaction giving rise to a debt under the statute is one involving an offer or extension of credit. Rules of statutory construction mandate that the unambiguous term "transaction" be given its ordinary meaning and not that it be read

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[2]Because we conclude that a debt need not arise from a credit transaction in order to be covered by the statute, it is not necessary to discuss appellants' argument that a merchant extends credit to a consumer by accepting a check.

[3]Appellees have recently submitted notice that there is a proposal pending in the Senate to amend the statutory definition by adding a provision that "debt . . . does not include a draft drawn on a bank for a sum certain, payable on demand and signed by the maker." S. 1405, 105th Cong. § 207 (1997). They have made no argument based on this proposal, however, and it has not been enacted into law.

restrictively to mean "credit transaction" as appellees suggest. See Bass v. Stolper, Koritzinsky, Brewster & Neider, 111 F.3d 1322, 1325-26 (7th Cir. 1997) (citing Perrin v. United States, 444 U.S. 37, 42 (1979)).

Two other courts of appeals have recently held that a dishonored check creates a payment obligation fitting within the plain meaning of the FDCPA definition of "debt." See Bass, 111 F.3d at 1325-26; Charles v. Lundgren & Associates, P.C., 119 F.3d 739, 742 (9th Cir.), cert. denied, 66 U.S.L.W. 3416 (U.S. Dec. 15, 1997) (No. 97-658); see also Ryan v. Wexler & Wexler, 113 F.3d 91, 93 (7th Cir.), cert. denied, 118 S.Ct. 298 (1997) (following Bass). The reasoning in these cases is persuasive. Since a check written by a consumer in a transaction for goods or services "evidences the drawer's obligation to pay" and this obligation remains even if the check is dishonored, abusive collection practices related to the dishonored check are prohibited by the FDCPA. Bass, 111 F.3d at 1324-26; Charles, 119 F.3d at 742.

Since the statutory language is clear, it is not necessary to consult the legislative history, but that history reflects Congress' intent not to limit the FDCPA's protections to debts arising from credit transactions. See Bass, 111 F.3d at 1326-27. The definition of "debt" in early versions of the statute included a requirement that credit be offered and extended, see H.R. 13720, 94th Cong. (1976), but Congress deleted this language from subsequent drafts, thus refusing to limit the statute's coverage in the manner sought by appellees. See Bass, 111 F.3d at 1327. The House Committee Report

also sheds light on the drafters' intent: "[T]he committee intends that the term 'debt' include consumer obligations paid by check or other non-credit consumer obligations." H.R. Rep. No. 95-131, at 4 (1977).[4] Although appellees correctly note that much of the consideration of the bill focused on credit-related debt, the statute does not limit its reach to such situations and the legislative history is to the contrary, as evidenced by the discussion of dishonored check debt during the Congressional hearings and debate. See Bass, 111 F.3d at 1327 (reviewing statements made during consideration of FDCPA).

Landberg and New Concepts argue that because the FDCPA was codified as an amendment to the Consumer Credit Protection Act (CCPA), 15 U.S.C. §§ 1601 et seq., it can only be construed as governing credit transactions. The Bass court rejected this extrinsic evidence of Congressional intent as unnecessary where the statute is unambiguous and found it unpersuasive in any event in light of "the contrary intent evidenced in the Act's legislative history." 111 F.3d at 1328. The court noted that other amendments to the CCPA

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[4]Although the Senate version of the bill was ultimately substituted for the House version, the definition of "debt" remained substantially the same from the time of the House Report until final passage. The House definition was: "any obligation of an individual to pay money arising out of a transaction in which the money, property, or services which are the subject of the transaction are primarily for personal, family, or household purposes." H.R. Rep. No. 95-131, at 17.

have addressed consumer financial protections beyond those related to credit-based transactions and that it is unnecessary to look to the CCPA as an interpretive guide where the FDCPA has its own purpose and definitions.[5] See id.

In further support of their position, Landberg and New Concepts argue that the liability arising from a dishonored check is based on state tort and criminal law and therefore does not arise from a transaction within the meaning of the FDCPA. Dishonored checks are only criminal or tortious when the drawer knows or intends the check to be dishonored at the time it is written. See id. at 1329 (distinguishing checks dishonored due to bank error or miscalculation by the drawer). Moreover, courts generally will not create a fraud exception where none exists in the text of the statute. See id. at 1329-30. "[T]he wrong occasioned by debtor fraud is more appropriately redressed under the statutory and common law remedies already in place, not by a judicially-created exception that selectively gives a green light to the very abuses proscribed by the Act." Id. at 1330.

The district court did not have the benefit of the Bass and Charles decisions, and it turned for guidance to the Third Circuit opinion in Zimmerman, 834 F.2d 1163. The issue in

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[5]In following the reasoning in Bass, the Ninth Circuit distinguished its own precedent using the CCPA as a guide to interpret the FDCPA and noted its earlier case did not require that FDCPA definitions be restricted or that a term be used consistently throughout the CCPA. Charles, 119 F.3d at 742 (distinguishing Bloom v. I.C. Sys., Inc., 972 F.2d 1067 (9th Cir. 1992)).

Zimmerman was whether cable television companies were seeking to collect a debt within the meaning of the FDCPA when they demanded compensation. The Third Circuit found that this type of liability was not a consumer debt under the statute because it did not arise from a transaction involving "the offer or extension of credit" in which a consumer acquired goods or services and deferred payment. Id. at 1168-69. This reading is contrary to the plain language of the statute as well as the legislative history, but it was not necessary for the outcome because an obligation arising from theft cannot be a debt under the statute since it does not arise from a consensual transaction for goods or services. See Bass, 111 F.3d at 1326. Zimmerman therefore does not control in this case.

For these reasons third-party attempts to collect payment on a dishonored check can be debt collection practices within the meaning of the FDCPA and be subject to its consumer protections. Accordingly, the judgment dismissing plaintiffs' complaints under the FDCPA is reversed, and the case is remanded for proceedings consistent with this opinion.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS,
EIGHTH CIRCUIT.

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF MISSOURI
THIRD DIVISION

ORDERS
FILED, JANUARY 17, 1997
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TRANSCRIPT
JANUARY 17, 1997
PAGE 17

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
THIRD DIVISION

Susan M. Quaderer,
Plaintiff

v.

Kevin W. Landberg, Attorney at Law, and New Concepts Business Services, Inc., a Minnesota Corporation,
Defendants.

Civil File No. 3-96-788

ORDER

This matter is before the Court upon Defendants' Motion to Dismiss under Fed.R.Civ.P. 12(b)(6) for failure to state a claim upon which relief can be granted. Based on the entire record and the arguments of parties and for the reasons articulated at oral argument on this matter, the Court determines that Defendants' Motion to Dismiss should be granted.

Accordingly, **IT IS HEREBY ORDERED** THAT:

1. Defendants' Motion to Dismiss is (Clerk Doc. No. 3) is GRANTED; and
2. The Complaint is DISMISSED WITH PREJUDICE.

LET JUDGMENT BE ENTERED ACCORDINGLY.

Dated: /s/ January 17, 1997

/s/Paul A. Magnuson
Paul A. Magnuson
United States District Court Judge

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
THIRD DIVISION

William E. Duffy, Civil File No. 3-96-595

Plaintiff

v. **ORDER**

Kevin W. Landberg, Attorney at Law, and New Concepts Business Services, Inc., a Minnesota Corporation,

Defendants.

This matter is before the Court upon Defendants' Motion to Dismiss under Fed.R.Civ.P. 12(b)(6) for failure to state a claim upon which relief can be granted. Based on the entire record and the arguments of parties and for the reasons articulated at oral argument on this matter, the Court determines that Defendants' Motion to Dismiss should be granted.

Accordingly, **IT IS HEREBY ORDERED** THAT:

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LET JUDGMENT BE ENTERED ACCORDINGLY.

Dated: /s/ January 17, 1997.

/s/Paul A. Magnuson

Paul A. Magnuson

United States District Court Judge

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
THIRD DIVISION

Dennis G. Hacken,
Plaintiff

v.

Kevin W. Landberg, Attorney at Law, and New Concepts Business Services, Inc., a Minnesota Corporation,
Defendants.

Civil File No. 3-96-1082

ORDER

This matter is before the Court upon Defendants' Motion to Dismiss under Fed.R.Civ.P. 12(b)(6) for failure to state a claim upon which relief can be granted. Based on the entire record and the arguments of parties and for the reasons articulated at oral argument on this matter, the Court determines that Defendants' Motion to Dismiss should be granted.

Accordingly, **IT IS HEREBY ORDERED** THAT:

1. Defendants' Motion to Dismiss is (Clerk Doc. No. 3) is GRANTED, and
2. The Complaint is DISMISSED WITH PREJUDICE.

LET JUDGMENT BE ENTERED ACCORDINGLY.

Dated: /s/ January 17, 1997.

/s/Paul A. Magnuson
Paul A. Magnuson
United States District Court Judge

UNITED STATES DISTRICT COURT

DISTRICT OF MINNESOTA

THIRD DIVISION

William Duffy,

Plaintiff,

Civil Nos. 3-96-595
3-96-788
3-96-1082

-v-

Kevin W. Landberg, et al.,

Defendants.

TRANSCRIPT OF CIVIL MOTION PROCEEDINGS
BEFORE THE HONORABLE
CHIEF JUDGE PAUL A. MAGNUSON
St. Paul, Minnesota
January 17, 1997

APPEARANCES:

For the Plaintiffs: Eric L. Crandall

For the Defendants: Kevin W. Landberg

Official Court Reporter: Jeanne M. Anderson

Friday morning,
January 17, 1997,
10:10 o'clock, a.m.

THE COURT: Good morning, Counsel. We have three really identical matters on motion this morning, Duffy -v-Landberg and Quaderer -v- Landberg and Hacken -v-Landberg, all on Rule 12(b)(6) motions for dismissal.

Counsel, do you want to tell me why I should dismiss the cases?

MR. LANDBERG: Yes, Your Honor. For the record, my name is Kevin W. Landberg, Your Honor. I represent both myself and New Concepts Business Services, Your Honor. Plaintiffs' claims should be dismissed in accordance with Rule 12(b)(6) in that plaintiffs, claims fail to state a cause of action. My brief explains the reason why plaintiffs, claims should be dismissed, Your Honor. I won't reiterate. I will just hit a highlight.

I think the key issue is that plaintiffs" claim fails to state a cause of action under the FDCPA because plaintiffs do not allege an offer or extension of credit. A claim that fails to allege an offer or extension of credit fails to state a claim under the FDCPA. Abundant case laws supports this proposition, Your Honor: Zimmerman versus HBO, which I

have cited in my brief, Your Honor. Arnold -v- Truemper, which I have cited in my brief, Your Honor; Shorts -v- Palmer, which I have cited in my brief, Your Honor; Perez -v- Slutsky that I have cited in my brief, Your Honor; and Charles -v- Checkrite that I have cited in my brief, Your Honor, and McClean -v- Melville Collections cited in my brief; Cederstrand -v- Landberg which I cited in my brief, Your Honor; and there is another new case which says the same thing, Sarber versus capital Recovery Associates, Your Honor.

THE COURT: Counsel, is that cited?

MR. LANDBERG: Yes, Your Honor, it's a 1996 West Law, Your Honor, 668, Your Honor, 424, Your Honor. It is out if the Eastern District of Pennsylvania, Your Honor.

Furthermore, Your Honor, a tender of payment by check is not an offer or an extension of credit under the FDCPA. The McClean versus Melville Collections case says that, and that was citing the Perez -v- Slutsky case, Your Honor. Therefore, Your Honor, because plaintiffs fail to allege an offer or extension of credit, their claim should be dismissed.

Thank you, Your Honor.

THE COURT: Okay, thank you. Counsel?

MR. CRANDALL: For the record, Eric Crandall

appearing on behalf of the plaintiffs, Your Honor. In addition to the Sarber case there is another new case that has come up since the arguments were submitted.

THE COURT: Oh, okay.

MR. CRANDALL: I will provide you with the cite. I have already provided counsel with the cite. The matter of Locklin L-o-c-k-l-i-n. It is at 101 F.3d 435. You should pay attention to page 443 at Note 10. It is dicta, but the Fifth Circuit decided that a check is a transaction. And that dovetails with the arguments that are being presented today.

This is a new area under the FDCPA, or new arguments are being made by counsel, hot and heavy. I cited in a letter to the Court, and providing a copy to counsel, that there are two cases, one in the Ninth Circuit and one in the Seventh Circuit on appeal. The Bass case and the Charles versus Checkrite case. Neither case has been decided. I checked with both Court of Appeals yesterday. They are still pending. I understand that the Seventh Circuit moves things along pretty quickly and I understand the Ninth circuit does not because of question --

THE COURT: You got that right. And on top of that we always pick on the Ninth Circuit, so--

MR. CRANDALL: Pardon me?

THE COURT: And on top of that we always pick on the Ninth Circuit.

MR. CRANDALL: That's true. That's true, Your Honor.

A couple of comments. I don't want to go over everything that is in the brief, but there are some important things I would like to point out.

First of all, this is an important, very important issue. There are over 50 billion checks that are written each year. And the statistics show that approximately 4 percent bounce.

Now, not all of those are subject to collection activities and certainly not all of those are consumer checks or for the purchase of consumer goods, but it is an important issue. There are a lot of new cases that are coming up every day.

The whole issue focuses on the FDCPA, whether an NSF check is a debt. And basically, the cases that counsel has cited focus on whether there is a transaction. If I borrow money from someone and agree to a payment schedule, that is a transaction. On the other hand, if I write a check for the purchase of goods, is that a transaction?

As for the pleadings, the Cederstrand case doesn't apply to these facts. In the Cederstrand case, the plaintiffs, cause of action was dismissed basically because of a drafting error. In that case, plaintiff's counsel failed to allege that there was a debt.

In fact, the Cederstrand case specifically says that there is no allegation of debt as defined by the FDPCA. Plaintiffs, pleadings in these three cases specifically say that there is a debt under the Fair Debt Collection Practices Act. There is also the proper allegation that the plaintiffs are consumers and that the purchases were for consumer goods.

Defendant also focuses on tort liability, Zimmerman and the Shorts case. In the Zimmerman case, several individuals in the Philadelphia area were pirating HBO signals. In the Shorts case an individual stole some cigars. After these events had occurred, both individuals were subject to debt collection activity. In both cases the representative of the courts found that collection of an obligation that arose from a tort is not covered by the FDCPA.

In this case, NSF checks are governed by contract law. In my brief I have cited Minnesota's version of the UCC which makes it very clear that the obligations and the rights and liabilities of the parties arising from an NSF check are governed by contract law.

The Locklin decision that I mentioned earlier also discusses that. And dicta does make it clear that a check is a credit transaction. And if the check is a credit transaction, the FDCPA should apply.

Counsel also argues that statutory liability under Minn. Stat. 332.50 takes these cases outside of the FDCPA. Minnesota law provides for civil liability for the issuance of a worthless check or NSF check. Unfortunately, that statute does not ever mention the word, tort. It is not a tort. It is a

statutorily created liability.

Finally, the statute, itself, does mention that the statute does not affect a creditor's other remedies, which infers that there are contractual remedies that a creditor would have against someone who had written an NSF check.

Finally, Minnesota has a, what I will refer to as a Uniform. Deceptive Act Practices Statutes, the Minnesota Prevention of Consumer Fraud Act, it is Count 2 in the complaint. And it alleges that the defendant engaged in a deceptive practice by adding surcharges, et cetera, to the NSF checks.

There is not a lot of cases on this and there is no real case on point under the Minnesota Statute. But, the Scrimpsher case cited in my materials does apply the New York version of this statute to NSF checks, saying that the attempt o collect an NSF check and adding unlawful surcharges would rigger the New York law, which I believe is New York General Business Statute Section 349.

In conclusion, Your Honor, I believe that all three plaintiffs have properly alleged that the NSF checks they have written are subject to the FDCPA; that the FDCPA does apply to NSF checks, in general; and that the Minnesota prevention of Consumer Fraud Act does also apply to this case. Thank you.

THE COURT: Okay. Thank you. Counsel, anything further?

MR. LANDBERG: Yes, Your Honor.

THE COURT: Mr. Landberg?

MR. LANDBERG: Okay. I just want to reiterate, Your
Honor, that Zimmerman and other various case law that --

THE COURT: Excuse me, Counsel, I am not hearing you. Could you get a little bit closer to the mike?

MR. LANDBERG: Yes, Your Honor.

THE COURT: I have got to say, Mr. Landberg, my reporter can take you. I have known before she is the best reporter in the world. I can sure add that today, because you talk faster than any person I think I have ever heard.

MR. LANDBERG: Oh, sure. Your Honor, I will try to slow down. Your Honor, I'm sorry. Yes, Your Honor.

As I said in my other presentation, that under Zimmerman and all of the progeny, including Cederstrand, the plaintiffs' complaints do not allege an offer or extension of credit; and therefore, plaintiffs' claims must fail.

Opposing counsel cited the UCC governs concerning checks. And in the case of In re: Anderson at 181 Bankruptcy Reporter, and the page is 952, Your Honor, Section 11, it says that Minnesota Statute 332.50 is entitled to civil liability for

issuance of worthless check. It creates certain rights of recovery for the holder of a dishonored check above and beyond any existing contractual or statutory right to receive the face value on it, Your Honor.

Okay. Concerning the Scrimpsher case, Your Honor, there's three -- there's really a few big differences in the present case and the Scrimpsher case, Your Honor. Number one, the Scrimpsher case was decided under the New York General Business Code. And secondly, we have our own statute, Minnesota Statute 332.50, Your Honor, to help guide us.

And the problem, a bounced check was so bad in Minnesota, Your Honor, that when it passed 1983, the Senate passage was unanimous, 61 to 0, that can be found in the Journal on the Senate, 52nd day at page 2510, Your Honor.

The House passage also was unanimous, Your Honor, 131 to nothing, Your Honor. That can be found in the Journal of the

House, 52nd day, page 3819, May 12th of 1983, Your Honor. And also, the New York -- the Scrimpsher case did not have any interpretive federal cases like we have here, Your Honor. In re: Scrimpsher did not have it. Here we have In re: Anderson that I have just cited to guide us. And that says: That we have certain rights of recovery for the holder of a dishonored check above and beyond any pre-existing statutory contractual rights, Your Honor.

So, Your Honor, in conclusion, Your Honor, all of

plaintiffs, claims should be dismissed, Your Honor.

THE COURT: Okay, thank you. Mr. Crandall, anything?

MR. CRANDALL: Nothing further, Your Honor.

THE COURT: Counsel, you have been pretty efficient in your arguments here before me this morning. It didn't take very long in doing it. I may end up talking longer than both f you combined.

I have had opportunity to review these three matters which are really identical prior to coming in today and have given consideration to your arguments today, consideration to the submissions that have been submitted. And I think as a result of that, the Court is ready to rule with respect to the cases.

As I indicated, the three lawsuits do arise from substantially identical facts. In June of 1993, the Plaintiff Duffy wrote a check to Snyder Drug stores in the amount of $25.00 for the purchase of consumer goods. September of 1994, t he Plaintiff Quaderer -- I'm not sure I am pronouncing that correctly, but it is the best I can do -wrote a check to Snyder Drug Stores in the amount of $24.40 for the purchase of consumer goods.

In March of 1991, Plaintiff Hacken wrote a check to MGM
Liquor in the amount of $11.38 for the purchase of consumer

goods. Each plaintiff's check was dishonored upon presentment and returned for insufficient funds or NSF. Each plaintiff subsequently received a letter from the New Concepts Business Services, Inc., that is New Concepts, that seeks to collect the debts that were owed.

The correspondence stated that the balance owed by Duffy, Quaderer and, Hacken was $45, $44 and $31.38, respectively. After several weeks passed, the plaintiffs each received another letter which was on the letterhead of Kevin W. Landberg, Attorney at Law. The letter stated that Defendant Landberg's firm had been retained by New Concepts for the purpose of collecting the outstanding debt.

The letters further stated that the balance now owed by Duffy, Quaderer and Hacken was $161, $156.90, $145.28, respectively. The increase in debt amount was attributed to application of the $20 service charge, the $10 collection fee, interest and a civil penalty in the amount of $100. Each plaintiff was provided with a settlement offer which constituted a dollar figure below the new debt amount stated herein. And in addition, each letter stated that legal action may be commenced against the individual plaintiffs unless payment was received by the Defendant Landberg.

All three plaintiffs filed separate two-count complaints seeking damages for alleged violations of the Fair Debt Collection Practices Act, that's the FDCPA, the Minnesota Prevention of Consumer Fraud Act, the Consumer Fraud Act.

The defendants now bring the motions to dismiss the three complaints. And in particular, the defendants argue that

the debts at issue here do not fall within the purview of the FDCPA. And furthermore, the Consumer Fraud Act is inapplicable because the alleged fraud does not relate to the sale of merchandise.

For the purpose of the defendants' motion to dismiss, the Court takes all facts alleged in plaintiff's complaint as true. See Wescott -v- Omaha 901 F.2d 1486, page 1488, the Eighth Circuit, 1990.

Further, the Court must construe the allegations in the complaints and reasonable inferences arising from the complaints favorably to plaintiffs. See Morton -v- Becker at 793 F.2d 185, page 187, Eighth Circuit of 1986. A motion to dismiss will be granted only if it appears beyond doubt that the plaintiff can prove no set of facts which would entitle him to relief. See Conley -v- Gibson at 355 U.S. 41, 45-46, 1957.

The Court reviews the present motion with these standards in mind. First, the Fair Debt Collection Practices Act. The FDCPA was enacted to eliminate abusive debt collection practices by debt collectors, pursuant to 15 U.S.C. Section 1692(e). In order to maintain a claim under the Act a plaintiff must first establish that the alleged prohibited collection practices have been used in an attempt to collect a debt. The FDCPA defines debt as any obligation or alleged obligation of the consumer to pay money arising out of a transaction which the money, property, insurance or services, which are the subject of the transaction, are a primarily for personal, family, or household purposes. See 15 U.S.C. Section 1692(a)5.

Nowhere in the Act, however, is there a definition of what transaction may give rise to a debt. See Zimmerman -v- HBO Affiliate Group, 834 F 2d 1163 at page 1167, the Third Circuit, 1987. Addressing this question, the Third Circuit has held that we find that the type of transaction which may give rise to a debt as defined in the FDCPA is the same type of transaction as dealt with in all other subchapters of the Consumer Credit Protection Act to which the FDCPA was enacted as an amendment; that is, one involving the offer or extension of credit to a consumer. Specifically, it is a transaction in which a consumer is offered or extended the right to acquire money, property, insurance or services which are primarily for household purposes and to defer payment, at pages 1168-1169.

In other words, when the debt at issue does not arise rom a transaction involving an offer or extension of credit to a consumer, the debt does not fall within the purview of he FDCPA. See Zimmerman at 834 F.2d 1169, Cederstrand -v- Landberg
933 F.Supp. 804 at 806, District of Minnesota, 1986. Battye -v- Child Support Services Inc., 873 F. Supp. 103, 105, the Northern District of Illinois, 1994.

Here, defendants' letters were not an attempt to collect debt as defined by the FDCPA. Courts in other jurisdictions have held that an exchange for consumer goods in return for payment by check is not an offer or extension of credit in which the consumer is permitted to defer payment. See McClean-v- Melville Collections 1995 WL 646384 at *3,

Northern District of Illinois, October 25, 1995. See also Perez -v- Slutsky 1994 WL 698519, at *2, Northern District of Illinois, December 12, 1994. See also Narwick -v- Wexler at 901 F.Supp. 1275 at Page 1281, the Northern District of Illinois of 1995. This Court agrees. The plaintiffs claim that because their checks were dishonored and returned for insufficient funds, the resulting debt liability is consumer debt within the meaning of the Act. These alleged facts, however, do not show that the checks arose from the transaction in which the plaintiffs were offered or extended credit. A complaint that fails to allege an offer or extension of credit fails to state a claim under the FDCPA pursuant to Zimmerman, 834 F.2d at 1168, 69, see also Cederstrand at 933 F.Supp. at 806. Consequently the plaintiffs claims under the FDCPA must be dismissed.

Number 2, the Minnesota Prevention of Consumer Fraud Act. The second count in each plaintiff's complaint alleges that the defendants violated the Minnesota Consumer Fraud Act Minnesota Statutes 325.Fed 68 and 69 -- no, I'm sorry, I get so used to reading F as Fed., I lose track of my cites. At 325F 68-69. The Consumer Fraud Act provides in part that the act, use or employment by any person or fraud, false pretense, false promise, misrepresentation, misleading statement or deceptive practices, with the intent that others rely thereon in connection with the sale of any merchandise, whether or not any person has in fact been misled, deceived or damaged thereby is enjoinable as provided herein.

Minnesota Statutes 325F.69, subd. 1. Courts

construing this section have concluded that it is necessary that there be a nexus between the fraud alleged and the sale of merchandise for the Consumer Fraud Act to apply. See Cooperman -v- R.G. Barry Corp., at 775 F.Supp. 1211, 1213, District of Minnesota, 1991. Banbury -v- Omnitron International, Inc., 533 N.W.2d 876, 882, Minnesota Court of Appeals, 1995. Here the alleged fraud did not occur in a transaction between a seller of consumer goods and a buyer, but in the debt collection practices allegedly undertaken by defendants. While these debt collection actions flow from plaintiffs, payments for merchandise with subsequent dishonored checks, they are not themselves sales of merchandise. Plaintiffs have made no factual allegations showing that they have encountered fraud in the context of sale of goods. Therefore, plaintiffs' claims under the Minnesota Consumer Fraud Act must be dismissed, as well.

In summary, plaintiffs' complaints fail to allege facts that the alleged debts are covered by the FDCPA; therefore, the Court finds that the complaints fail to state a claim under the FDCPA.

In addition, the complaints do not allege facts showing a nexus between the alleged fraud and sale of merchandise; thereby failing to state a claim under the Consumer Fraud Act. Accordingly, the Court dismisses all three complaints with prejudice pursuant to Federal Rule of Civil Procedure 12(b)(6) because the plaintiffs have failed to state claims upon which relief can be granted.

Now Counsel, I have read into the record the Court's

reasons for ruling with respect to this case. I will enter a short form order with respect to the case and would reserve the right to issue a formal order should that be deemed necessary. However, I seriously doubt that I will be entering such a formal order.

Okay. Thank you very much.

Certified by:
Jeanne M. Anderson, RPR-CM
Official Court Reporter

APPENDIX C

RELEVANT STATUTORY EVIDENCE

15 U.S.C. § 1692a
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SENATE BILL 91405
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CONSUMER CREDIT PROTECTION ACT
SENATE REPORT NO. 95-382
LEGISLATIVE HISTORY AND EXPLANATION
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MINN. STAT. § 332.50
Page 57

LAWS OF MINNESOTA, CH. 157 § 65-66
Page 62

MINN. STAT. § 3-104
Page 66

15 U.S.C. § 1692a. Definitions

As used in this subchapter--

(1) The term "Commission" means the Federal Trade Commission.

(2) The term "communication" means the conveying of information regarding a debt directly or indirectly to any person through any medium.

(3) The term "consumer" means any natural person obligated or allegedly obligated to pay any debt.

(4) The term "creditor" means any person who offers or extends credit creating a debt or to whom a debt is owed, but such term does not include any person to the extent that he receives an assignment or transfer of a debt in default solely for the purpose of facilitating collection of such debt for another.

(5) The term "debt" means any obligation or alleged obligation of a consumer to pay money arising out of a transaction in which the money, property, insurance, or services which are the subject of the transaction are primarily for personal, family, or household purposes, whether or not such obligation has been reduced to judgment.

(6) The term "debt collector" means any person who uses any instrumentality of interstate commerce or the mails in any business the principal purpose of which is the collection of any debts, or who regularly collects or attempts to collect, directly or indirectly, debts owed or due or asserted to be owed or due another. Notwithstanding the exclusion provided

by clause (F) of the last sentence of this paragraph, the term includes any creditor who, in the process of collecting his own debts, uses any name other than his own which would indicate that a third person is collecting or attempting to collect such debts. For the purpose of section 1692f(6) of this title, such term also includes any person who uses any instrumentality of interstate commerce or the mails in any business the principal purpose of which is the enforcement of security interests. The term does not include--

(A) any officer or employee of a creditor while, in the name of the creditor, collecting debts for such creditor;

(B) any person while acting as a debt collector for another person, both of whom are related by common ownership or affiliated by corporate control, if the person acting as a debt collector does so only for persons to whom it is so related or affiliated and if the principal business of such person is not the collection of debts;

(C) any officer or employee of the United States or any State to the extent that collecting or attempting to collect any debt is in the performance of his official duties;

(D) any person while serving or attempting to serve legal process on any other person in connection with the judicial enforcement of any debt;

(E) any nonprofit organization which, at the request of consumers, performs bona fide consumer credit

counseling and assists consumers in the liquidation of their debts by receiving payments from such consumers and distributing amounts to creditors; and **(F)** any person collecting or attempting to collect any debt owed or due or asserted to be owed or due another to the extent such activity (i) is incidental to a bona fide fiduciary obligation or a bona fide escrow arrangement; (ii) concerns a debt which was originated by such person; (iii) concerns a debt which was not in default at the time it was obtained by such person; or (iv) concerns a debt obtained by such person as a secured party in a commercial credit transaction involving the creditor.

(7) The term "location information" means a consumer's place of abode and his telephone number at such place, or his place of employment.

(8) The term "State" means any State, territory, or possession of the United States, the District of Columbia, the Commonwealth of Puerto Rico, or any political subdivision of any of the foregoing.

105TH CONGRESS
1ST SESSION S 91405

To provide for improved monetary policy and regulatory reform in financial institution management and activities, to streamline financial regulatory agency actions, to provide for improved consumer credit disclosure, and for other purposes.

IN THE SENATE OF THE UNITED STATES
NOVEMBER 7, 1997

Mr. SHELBY (for himself, Mr. MACK, Mr. FAIRCLOTH, Mr. D'AMATO, Mr. BRYAN, Mr. GRAMS, Mr. KERRY, Mr. BENNETT, Mr. GRAMM, Mr. HAGEL, Mr. ALLARD, Mr. ENZI and Ms. MOSELEY-BRAUN) introduced the following bill; which was read twice and referred to the Committee on Banking, Housing, and Urban Affairs

---

A BILL

To provide for improved monetary policy and regulatory reform in financial institution management and activities, to streamline financial regulatory agency actions, to provide for improved consumer credit

disclosure, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE; TABLE OF CONTENTS.

(a) SHORT TITLE.--This Act may be cited as the "Financial Regulatory Relief and Economic Efficiency Act of 1997"

SEC. 207. FAIR DEBT COLLECTION PRACTICES.

(a) EXEMPTION FOR COMMUNICATIONS INVOLVING LEGAL PROCEEDINGS.--Sec 803 of the Fair Debt Collection Practices Act (15 U.S.C. 1692a) is amended--

(1) in paragraph (2)--

(A) by striking "communication' means the" and inserting the following: "communication'--

"(A) means the", and

(B) by striking the period at the end and inserting the following: "; and

"(B) does not include communications made pursuant to the Federal Rules of Civil Procedure, in the case of a proceeding in a State court, the rules of civil procedure available under the laws of that State, or a nonjudicial foreclosure proceeding."; and

(2) in paragraph (5)--

(A) by striking "debt' means any" and inserting the following: "debt'--

"(A) means any";

(B) by striking the period at the end and inserting the following: "; and

"(B) does not include a draft drawn on a bank for a sum certain, payable on demand and signed by the maker."

CONSUMER CREDIT PROTECTION ACT

Pd- 95-109, see page 91 Stat. 874

House Report (Banking, Finance and Urban Affairs Committee)

No. 95-131, Mar. 29,1977 *(To* accompany H.R. 52941

Senate Report (Banking, Housing and Urban Affairs Committee)

No. 95-382, Aug. 2, 1977 (To accompany H.R. 52941

Cong. Record Vol. 123 (1977)

DATES OF CONSIDERATION AND PASSAGE

House April 4, September 8, 1977

Senate August 5, 1977

The Senate Report is set out.

SENATE REPORT NO. 95-382

[page 1]

The Committee on Banking, Housing, and Urban Affairs, to which was referred the bill (H.R. 5294) to amend the Consumer Credit Protection Act to prohibit abuses by debt collectors, having considered same, reports favorably thereon with an amendment and recommends that the bill as amended do pass.

HISTORY OF THE LEGISLATION

On May 12 and 13, 1977, the Consumer Affairs Subcommittee held hearings on four bills to regulate debt

collection practices. S 656.

LEGISLATIVE HISTORY

P.L. 95-109

introduced by Senator Biden, S. 918, introduced by Senator Riegle, S. 1130, introduced by Senator Garn for himself and Senators Schmitt and Tower, and H. R. 5294, passed by the House of Representatives on April 4, 1977. After these hearings and before markup by the committee, Senator Riegle offered a composite bill, designated Committee Print No. 1, as a substitute for S. 918.

The Committee met in open markup sessions on June 30 and July 26,1977, and approved Committee Print No. 1, with amendments, by voice vote. The committee substituted the text of its bill for that H. R. 5294, which is herewith reported without objection.

NATURE AND PURPOSE OF THE BILL

This legislation would add a new title to the Consumer Credit Protection Act entitled the Fair Debt Collection Practices Act. Its purpose is to protect consumers from a host of unfair, harassing, and deceptive debt collection practices without imposing unnecessary restrictions on ethical debt collectors. This bill was strongly supported by consumer groups, labor unions, State and Federal law enforcement officials, and by both national organizations which represent the debt collection profession, the American Collectors

Association and Associated Credit Bureaus.

NEED FOR THIS LEGISLATION

The committee has found that debt collection abuse by third party debt collectors is a widespread and serious national problem. Collection abuse takes many forms, including obscene or profane language, threats of violence, telephone calls at unreasonable hours, misrepresentation of a consumer's legal rights, disclosing a consumers personal affairs to friends, neighbors or an employer, obtaining information about a consumer through false pretense, impersonating public officials and attorneys, and simulating legal process.

Debt collection by third parties is a substantial business which touches the lives of many Americans. There are more than 5,000 collection agencies across the country, each averaging 8 employees. Last year, more than $5 billion in debts were turned over to collection agencies. One trade association which represents approximately half of the Nation's independent collectors states that in 1976 its members contacted 8 million consumers.

Hearings before the Consumer Affairs Subcommittee revealed that independent debt collectors are the prime source of egregious collection practices. While unscrupulous debt collectors comprise only a small segment of the industry the suffering and anguish which they regularly inflict is substantial. Unlike creditors, who generally are restrained by the desire to protect their good will when collecting past due accounts,

independent collectors are likely to have no future contact with the consumer and often are unconcerned with the consumer's opinion of them. Collection agencies generally operate on a 50-percent commission, and this has too often created the incentive to collect by any means.

The primary reason why debt collection abuse is so widespread is the lack of meaningful legislation on the State level. While debt collection agencies have existed for decades, there are 13 States, with 40 million citizens, that have no debt collection laws. These States are Alabama, Delaware, Georgia, Kansas, Kentucky, Mississippi, Missouri, Montana, Ohio, Oklahoma, Rhode Island, South Carolina, and South Dakota. Another 11 States (Alaska, Arkansas, Indiana, Louisiana, Nebraska, New Jersey, Oregon, Pennsylvania, Utah, Virginia and Wyoming), with another 40 million citizens, have laws which in the committee's opinion provide little or no effective protection. Thus, 80 million Americans, nearly 40 percent of our population, have no meaningful protection from debt collection abuse.

While 37 States and the District of Columbia do have laws regulating debt collectors, only a small number are comprehensive statutes which provide a civil remedy. As an example of ineffective State laws, of the 16 states which regulate by debt collection boards, 12 require by law that a majority of the board be comprised of debt collectors.

The Committee has found that collection abuse has grown from a State problem to a national problem. The use of WATS lines by debt collectors has led to a dramatic

increase in interstate collections. State law enforcement officials have pointed to this development as a prime reason why federal legislation is necessary, because State officials are unable to act against unscrupulous debt collectors who harass consumers from another State.

One of the most frequent fallacies concerning debt collection legislation is the contention that the primary beneficiaries are "deadbeats." In fact, however, there is universal agreement among scholars, law enforcement officials, and even debt collectors that the number of persons who willfully refuse to pay just debts is minuscule. Prof. David Caplovitz, the foremost authority on debtors in default, testified that after years of research he has found that only 4 percent of all defaulting debtors fit the description of "deadbeat." This conclusion is supported by the National Commission on Consumer Finance which found that creditors list the willful refusal to pay as an extremely infrequent reason for default.

The Commission's findings are echoed in all major studies: the vast majority of consumers who obtain credit fully intend to repay their debts. When default occurs, it is nearly always due to an unforeseen event such as unemployment, overextension, serious illness, or marital difficulties or divorce.

The committee believes that the serious and widespread abuses in this area and the inadequacy of existing State and Federal laws make this legislation necessary and appropriate.

EXPLANATION OF THE LEGISLATION

Scope of the act

This bill applies only to debts contracted by consumers for personal, family, or household purposes; it has no application to the collection of commercial accounts.

The committee intends the term "debt collector," subject to the exclusions discussed below, to cover all third persons who regularly collect debts for others. The primary persons intended to be covered are independent debt collectors. The requirement that debt collection be done "regularly" would exclude a person who collects a debt for another in an isolated instance, but would include those who collect for others in the regular course of business. The definition would include "reciprocal collections" whereby one creditor regularly collects delinquent debts for another pursuant to a reciprocal service agreement, unless otherwise excluded by the act.

The term debt collector is not intended to include the following: "in house" collectors for creditors so long as they use the creditor's true business name when collecting; Government officials, such as marshals and sheriffs, while in the conduct of their official duties; process servers; nonprofit consumer credit counseling services which assist consumers by apportioning the consumer's income among his creditors pursuant to a prior arrangement; and attorneys-at-law while acting in that capacity. One subsidiary or affiliate which collects debts for another subsidiary or affiliate is not a "debt

collector" so long as the collecting affiliate collects only for other related entities and its principal business is not debt collection.

Finally, the committee does not intend the definition to cover the activities of trust departments, escrow companies, or other bona fide fiduciaries; the collection of debts, such as mortgages and student loans, by persons who originated such loans; mortgage service companies and others who service outstanding debts for others, so long as the debts were not in default when taken for servicing; and the collection of debts owed to a creditor when the collector is holding the receivable account as collateral for commercial credit extended to, the creditor.

Obtaining location information

While this legislation strongly protect's the consumer's right to, privacy by prohibiting a debt collector from communicating the consumer's personal affairs to third persons, the committee also recognizes the debt collector's legitimate need to seek the whereabouts of missing debtors. Accordingly, this bill permits debt collectors to contact third persons for the purpose of obtaining the consumer's location. In seeking this information, however, the debt collector must observe certain guidelines: he may not state that the consumer owes a debt nor contact third persons more than once unless necessary to obtain complete information. In addition, a debt collector may not place language or symbols on mail to third persons indicating that, the mail relates to debt collection nor continue to contact third parties after learning the name and

address of the consumer's attorney, unless the attorney fails to respond to the debt collector's communications.

Prohibited practices

This legislation expressly prohibits a host of harassing, deceptive, and unfair debt collection practices. These include: threats of violence; obscene language; the publishing of "shame lists;" harassing or anonymous telephone calls; impersonating a government official or attorney; misrepresenting the consumer's legal rights; simulating court process; obtaining information under false pretenses; collecting more than is legally owing; and misusing postdated checks. In addition to these specific prohibitions, this bill prohibits in general terms any harassing, unfair, or deceptive collection practice. This will enable the courts, where appropriate, to proscribe other improper conduct which is not specifically addressed.

In addition, this legislation adopts an extremely important protection recommended by the National Commission on Consumer Finance and already the law in 15 States: it prohibits disclosing the consumer's personal affairs to third persons. Other than to obtain location information, a debt collector may not contact third persons such as a consumer's friends, neighbors, relatives, or employer. Such contacts are not legitimate collection practices and result in serious invasions of privacy, as well as the loss of jobs.

Validation of debts

Another significant feature of this legislation is its provision requiring the validation of debts. After initially

contacting a consumer, a debt collector must send him or her written notice stating the name of the creditor and the amount owed. If the consumer disputes the validity of the debt within 30 days, the debt collector must cease collection until he sends the consumer verification.

This provision will eliminate the recurring problem of debt collectors dunning the wrong person or attempting to collect debts which the consumer has already paid. Since the current practice of most debt collectors is to send similar information to consumers, this provision will not result in additional expense or paperwork.

Legal actions by debt collectors

This legislation also addresses the problem of "forum abuse," an unfair practice in which debt collectors file suit against consumers in courts which are so distant or inconvenient that consumers are unable to appear. As a result, the debt collector obtains a default judgment and the consumer is denied his day in court.

In response to this practice, the bill Adopts the "fair venue standards" developed by the Federal Trade Commission. A debt collector who files suit must do so either where the consumer resides or where the underlying contract was signed. When an action is against real property, it must be brought where such property is located.

More thin 1,000 collection agencies in all 50 States have already voluntarily agreed to follow these standards. The Commission reports that this standard is effective in curtailing forum abuse without unreasonably restricting debt collectors.

Furnishing deceptive forms

Another common collection abuse is known colloquially as "flatrating." A "flat-rater" is one who sells to creditors a set of dunning letters bearing the letter-head of the flat-rater's collection agency and exhorting the debtor to pay the creditor at once. The creditor sends these letters to his debtors, giving the impression that a third party debt collector is collecting the debt. In fact, however, the flat-rater is not in the business of debt collection, but merely sells dunning letters. This bill prohibits the practice of flat-rating, because of its inherently deceptive nature. The prohibition on furnishing such forms does not apply, however, to printers and custom stationery sellers who innocently print or sell such forms without knowledge of their intended use.

Civil liability

The committee views this legislation as primarily self-enforcing; consumers who have been subjected to collection abuses will be enforcing compliance.

A debt collector who violates the act is liable for any actual damages he caused as well as any additional damages the court deems appropriate, not exceeding $1 000. In assessing damages, the court must take into account the nature of the violation, the degree of willfulness, and the debt collector's persistence. A debt collector has no liability, however, if he violates the act in any-manner, including with regard to the act's coverage, when such violation is unintentional and occurred despite procedures designed to avoid such violations. A debt collector also has no liability if

he relied in good faith on an advisory opinion issued by the Federal Trade Commission.

As in all other Federal consumer protection legislation, a consumer who obtains judgment on his behalf is entitled to attorney's fees and costs. In order to protect debt collectors from nuisance lawsuits, if the court finds that an action was brought by a consumer in bad faith and for harassment the court may award the debt collector reasonable attorney's fees and costs.

Administrative enforcement

This legislation is enforced administratively primarily by the Federal Trade Commission. If a depository institution subject to regulation by another Federal agency engages in debt collection, administrative enforcement authority is lodged with that agency.

All enforcement agencies are authorized to utilize all their functions and powers to enforce compliance. The Federal Trade Commission is authorized to treat violations of the act as violations of a trade regulation rule, which empowers the Commission to obtain restraining orders and seek fines in federal district court.

Because the committee regards this as comprehensive legislation which fully addresses the problem of collection abuses, the administrative agencies charged with enforcement are specifically prohibited from issuing additional rules or regulations applicable to persons covered by this legislation.

Relation to State law

The Committee believes that this law ought not to

foreclose the States from enacting or enforcing, their own laws regarding debt collection. Accordingly, this legislation annuls only "inconsistent" State laws, with stronger State laws not regarded as inconsistent. In addition, States with substantially similar laws may be exempted from the act's requirements (but not its remedies) by applying to the Federal Trade Commission.

COST OF THIS LEGISLATION

Enactment of this legislation will result in no new or additional costs to the Federal Government. The Congressional Budget Office analysis of this bill is contained in the following letter:

CONGRESSIONAL BUDGET OFFICE,
U.S. CONGRESS,
Washington, D.C., July 27, 1977.

Hon. WILLIAM PROXMIRE, *Chairman, Committee on Banking, Housing, and Urban Affairs, U.S. Senate, Washington, D.C.*

DEAR MR. CHAIRMAN: Pursuant to section 403 of the Congressional Budget Act of 1974, the Congressional Budget Office has reviewed H.R. 5294, a bill to amend the Consumer Credit Protection Act to prohibit abusive practices by debt collectors, as ordered reported by the Senate Committee on Banking, Housing and Urban Affairs, July 26, 1977.

Based on this review, it appears that no additional cost to the Government would be incurred as a result of enactment of this bill

Sincerely,

ALICE M. RIVILIN, Director

SECTION-BY-SECTION SUMMARY

Section 801. Short title.--The act may be cited as the "Fair Debt Collection Practices Act."

Section 802. Findings and purpose. -- The Congress finds that collection abuses by independent debt collectors are serious and widespread and that existing State laws are inadequate to curb these abuses. The purpose of the title is to eliminate abusive practices, not disadvantage ethical debt collectors, and promote consistent state action.

Section 803. Definitions. -- The term "debt collector" is defined to include all third parties who regularly collect consumer debts for others, except for the following persons: "in house" collectors for creditors, affiliates collecting for one another, providing that collection is not the principal business of the affiliate; Government officials collecting in their official capacities; process servers, bona fide consumer credit counseling services, and attorneys-at-law. The term also does not include trust companies and other bona fide fiduciaries; persons collecting loans which they originated; persons who service debts for others; and persons holding receivables as collateral for commercial credit transactions.

Section 804. Acquisition of location information. --

When contacting third persons to establish a consumer's whereabouts, a debt collector may not: state that the consumer owes a debt, contact the third person more than once unless reasonably necessary, or use language symbols on mail indicating that it pertains to debt collection. A debt collector may not contact a third person if the debt collector knows that the consumer is represented by an attorney and has the attorney's name and address.

Section 805. Communication in connection with debt collection. -- Without the consumer's consent, a debt collector may not (a) contact a consumer at any unusual or inconvenient time or place (8 a.m. to 9 p.m. is considered convenient); (b) contact a consumer if he is represented by an attorney; or (c) call a consumer at work if the debt collector knows the consumer's employer prohibits such calls.

There is a general prohibition on contacting any third parties, (other than to obtain location information) except for: the consumer's attorney, a credit reporting agency; the creditor; the creditor's or debt collector's attorney; or any other person to the extent necessary to effectuate a post judgment judicial remedy.

If a consumer notifies a debt collector in writing that he refuses to pay a debt or wishes the debt collector to cease further contacts, the debt collector must cease communications except to notify the consumer of the debt collector's or creditor's possible further actions.

Section 806. harassment or abuse. -- A debt collector is prohibited from engaging in any conduct the natural

consequence of which is to harass, oppress or abuse any person. The following enumerated practices are violations: threats of violence, use of profane or obscene language; publishing "shame lists", repeated telephone calls intended to annoy or harass; and making telephone calls without disclosing the caller's identity.

Section 807. False or misleading representations.-- A debt collector is prohibited from using any false, deceptive or misleading representations to collect debts. The following enumerated practices are violations: misrepresenting that a debt collector is a government official; misrepresenting the amount or nature of a debt; impersonating an attorney; misrepresenting that a consumer will be arrested or his property seized; misrepresenting a consumer's legal rights; deliberately Communicating false credit information; utilizing, bogus legal documents and misrepresenting a collection agency as a credit bureau.

Section 808. Unfair practices. -- A debt collector is prohibited from using any unfair or unconscionable means to collect debts. The following enumerated practices are violations: collecting amounts in excess of the debt or interest owed; causing charges for communications to be billed to a consumer; repossessing property if there is no valid security interest or if it is exempt by law from repossession; communicating information about a debt by postcard, and using symbols on envelopes indicating, that the contents pertain to debt collection.

Section 809. Validation of debts.-- Within 5 days

after contacting a consumer, the debt collector must in writing notify the consumer of the amount of the debt and the name of the creditor and advise the consumer of the debt collector's duty to verify the debt if it is disputed. If a consumer disputes a debt within 30 days, the debt collector must stop collection until verification is sent to the consumer.

Section 810. Multiple debts. -- A debt collector is prohibited from applying payments to disputed debts and, where applicable, must apply payments in accordance with the consumers directions.

Section 811. Legal actions by debt collectors. -- Actions on real property are required to be brought in the judicial district in which the property is located. In personal actions, suits must be brought either where the contract was signed or where the consumer resides.

Section 812. Furnishing certain deceptive forms. -- It is made unlawful to compile, design , and furnish forms knowing that they will be used to create the false impression that a third person is collecting a debt.

Section 813. Civil liability. -- A debt collector who violates the Act is liable for actual damages plus costs and reasonable attorney's fees. The court may award additional damages of up to $1,000 in individual actions, and in claim actions, up to $500,000 or 1 percent of the debt collector's net worth, whichever is less.

Two defenses are provided: good faith reliance on an F.T.C. advisory opinion, and bona fide error notwithstanding procedures to avoid the error. Where a court finds that a suit

was brought by a consumer in bad faith and for harassment, the court may award reasonable attorney's fees to the defendant.

Jurisdiction for actions is conferred on U.S. district and state courts; there is a 1 year statute of limitations.

Section 814. Administrative enforcement. -- The Act is administratively enforced by the F.T.C. and the Federal bank regulatory agencies. The agencies are empowered to use all their functions and powers to enforce compliance. The agencies are prohibited from promulgating any additional rules or regulations pertaining to debt collectors.

Section 815. Reports to Congress by the Commission. -- The F.T.C. shall provide annual reports to Congress on the Act's effectiveness and administrative enforcement.

Section 816. Relation to State laws. -- The act annuls state laws only if inconsistent; a state law is not inconsistent if it provides greater protection than this title.

Section 817. Exemption for State regulation. -- The F.T.C. may exempt from the Act any collection practices within any State if subject to substantially similar requirements.

Section 818. Effective date. -- The act is effective 6 months from enactment.

ADDITIONAL VIEWS OF MESSRS SCHMITT, GARN AND TOWER

It is our view that the Fair Debt Collection Practices Act is an unwarranted Federal intrusion into an area best left to the States. Although we recognize that some debt

collectors employ unconscionable practices in collecting debts, we do not feel that the hearings in either the House or Senate subcommittees produced substantial evidence that there is a serious national problem which justifies such detailed Federal regulation of the operation of the business of collecting debts. A far better approach is that contained in S.1130 which would preserve the States' prerogative of providing a mechanism for the resolution of disputes between debtors and creditors while correcting identified abuses in irresponsible debt collectors operating in interstate commerce. According to an American Bar Association committee, 33 States have already adopted debt collection practices regulation and others are moving in that direction.

Of particular concern to us is the impact that the proliferation of Federal consumer credit regulation is having on small business and on the cost and availability of credit to the consumer. A Federal Fair Debt Collection Practice Act will be one more regulatory burden on small business, the cost of which will be borne by the consumer.

Although we would not take the approach chosen by the majority of the committee, the committee report is a vast improvement over H.R. 5294 passed by the House. We are pleased that the committee included in its final version of the bill many provisions contained in S.1130. Most important, it dropped the $160 minimum civil penalty provision which courts have construed as requiring the award of the penalty and attorneys fees when a violation of the Act has been established.

This should go a long way in avoiding the type of nuisance suits so prevalent under the Truth in Lending Act.

HARRISON SCHMITT.

JAKE GARN.

JOHN TOWER.

Minn. Stat. §332.50.

Civil liability for issuance of worthless check

Subdivision 1. Definitions. "Check" means a check, draft, order of withdrawal, or similar negotiable or nonnegotiable instrument. "Credit" means an arrangement or understanding with the drawee for the payment of the check. "Dishonor" has the meaning given in section 336.3-502, but does not include dishonor due to a stop payment order requested by an issuer who has a good faith defense to payment on the check.

Subd. 2. Acts constituting. (a) Whoever issues any check that is dishonored and is not paid within 30 days after mailing a notice of dishonor that includes a citation to this section and section 609.535, and a description of the penalties contained in these sections, in compliance with subdivision 3, is liable to the holder for: (1) the amount of the check plus a civil penalty of up to $ 100 or up to 100 percent of the value of the check, whichever is greater; (2) interest at the rate payable on judgments pursuant to section 549.09 on the face amount of the check from the date of dishonor; and (3) reasonable attorney fees if the aggregate amount of dishonored checks issued by the issuer to all payees within a six-month period is over $1,250.

(b) If the amount of the dishonored check plus any service charges that have been incurred under paragraph (d) or (e) have not been paid within 30 days after having mailed a notice of dishonor in compliance with subdivision 3 but before bringing an action, a payee may make a written demand

for payment for the liability imposed by paragraph (a) by sending a copy of this section and a description of the liability contained in this section to the issuer's last known address.

(c) After notice has been sent but before an action under this section is heard by the court, the plaintiff shall settle the claim if the defendant gives the plaintiff the amount of the check plus court costs, any service charge owed under paragraph (d), and reasonable attorney fees if provided for under paragraph (a), clause (3).

(d) A service charge may be imposed immediately on any dishonored check, regardless of mailing a notice of dishonor, if written notice of the service charge was conspicuously displayed on the premises when the check was issued. The service charge may not exceed $20, except that if the payee uses the services of a law enforcement agency to obtain payment of a dishonored check, a service charge of up to $25 may be imposed if the service charge is used to reimburse the law enforcement agency for its expenses. A payee may impose only one service charge under this paragraph for each dishonored check.

(e) This subdivision prevails over any provision of law limiting, prohibiting or otherwise regulating service charges authorized by this subdivision, but does not nullify charges for dishonored checks, which do not exceed the charges in paragraph (d) or the actual cost of collection, but in no case more than $30, or terms or conditions for imposing the charges which have been agreed to by the parties to an express contract.

Subd. 3. Notice of dishonor required. Notice of nonpayment or dishonor that includes a citation to this section and section 609.335, and a description of the penalties contained in these sections, shall be sent by the payee or holder of the check to the drawer by certified mail, return receipt requested, or by regular mail, supported by an affidavit of service by mailing, to the address printed or written on the check. The issuance of a check with an address printed or written on it is a representation by the drawer that the address is the correct address for receipt of mail concerning the check. Failure of the drawer to receive a regular or certified mail notice sent to that address is not a defense to liability under this section, if the drawer has had actual notice for 30 days that the check has been dishonored.

An affidavit of service mailing shall be retained by the payee or holder of the check.

Subd. 4. Proof of identity. The check is prima facie evidence of the identity of the drawer if the person receiving the check:

(a) records the following information about the drawer on the check, unless it is printed on the face of the check:

(1) name;

(2) home or work address;

(3) home or work telephone number; and

(4) identification number issued pursuant to section 171.07;

(b) compares the drawer's physical appearance,

signature, and the personal information recorded on the check with the drawer's identification card issued pursuant to section 171.07; and

(c) initials the check to indicate compliance with these requirements.

Subd. 5. Defenses. Any defense otherwise available to the drawer also applies to liability under this section.

Subd. 2. Acts constituting. (a) Whoever issues any check that is dishonored and is not paid within 30 days after mailing a notice of dishonor that includes a citation to this section and section 609.535, and a description of the penalties contained in these sections, in compliance with subdivision 3, is liable to the payee, holder, or agent of the holder for: (1) the amount of the check plus a civil penalty of up to $100 or up to 100 percent of the value of the check, whichever is greater; (2) interest at the rate payable on judgments pursuant to section 549.09 on the face amount of the check from the date of dishonor; and (3) reasonable attorney fees if the aggregate amount of dishonored checks issued by the issuer to all payees within a six-month period is over $1,250.

(b) If the amount of the dishonored check plus any service charges that have been incurred under paragraph (d) or (e) have not been paid within 30 days after having mailed a notice of dishonor in compliance with subdivision 3 but before bringing an action, a payee, holder, or agent of the holder may make a written demand for payment for the liability imposed by paragraph (a) by sending a copy of this section and a description of the liability contained in this

section to the issuer's last known address.

(c) After notice has been sent but before an action under this section is heard by the court, the plaintiff shall settle the claim if the defendant gives the plaintiff the amount of the check plus court costs, any service charge owed under paragraph (d), and reasonable attorney fees if provided for under paragraph (a), clause (3).

(d) A service charge may be imposed immediately on any dishonored check, regardless of mailing a notice of dishonor, if written notice of the service charge was conspicuously displayed on the premises when the check was issued. The service charge may not exceed $20, except that if the payee uses the services of a law enforcement agency to obtain payment of a dishonored check, a service charge of up to $25 may be imposed if the service charge is used to reimburse the law enforcement agency for its expenses. A payee may impose only one service charge under this paragraph for each dishonored check.

(e) This subdivision prevails over any provision of law limiting, prohibiting, or otherwise regulating service charges authorized by this subdivision, but does not nullify charges for dishonored checks, which do not exceed the charges in paragraph (d) or the actual cost of collection, but in no case more than $30, or terms or conditions for imposing the charges which have been agreed to by the parties to an express contract.

Sec. 65. Minnesota Statutes 1996, section 332.50, subdivision 1, is amended to read:

Subdivision 1. **DEFINITIONS.** "Check" means a check, draft, order of withdrawal, or similar negotiable or nonnegotiable instrument.

"Credit" means an arrangement or understanding with the drawee for the payment of the check.

"Dishonor" has the meaning given in section 336.3-502, but does not include dishonor due to a stop payment order requested by an issuer who has a good faith defense to payment on the check. "Dishonor" does include a stop payment order requested by an issuer if the account did not have sufficient funds for payment of the check at the time of presentment, except for stop payment orders on a check found to be stolen.

Sec. 66. Minnesota Statutes 1996, section 332.50, subdivision 2, is amended to read:

Subd. 2. **ACTS CONSTITUTING.** ~~(a)~~ Whoever issues any check that is dishonored ~~and is not paid within 30 days after mailing a notice of dishonor that includes a citation to this section and section 609.535, and a description of the penalties contained in these sections, in compliance with subdivision 3,~~ is liable ~~to the payee, holder, or agent of the holder~~ for the following penalties: ~~(1) the amount of the check plus a civil penalty of up to $100 or up to 100 percent of the value of the check, whichever is greater, (2) interest at the rate payable on judgments pursuant to section 549.09 on the face~~

amount of the check from the date of dishonor; and (3) reasonable attorney fees if the aggregate amount of dishonored checks issued by the issuer to al payees within a six-month period is over $1,250.

(b) If the amount of the dishonored check plus any service charges that have be incurred under paragraph (d) or (e) have not been paid within 30 days after having mailed a notice of dishonor in compliance with subdivision 3 but before bringing an action, a payee, holder, or agent of the holder may make a written demand for payment for the liability imposed by paragraph (a) by sending a copy of this section and a description of the liability contained in this section to the issuer's last known address.

(c) After notice has been sent but before an action under this section is heard by the court, the plaintiff shall settle the claim if the defendant gives the plaintiff the amount of the check plus court costs, any service charges owed under paragraph (d), and reasonable attorney fees if provided for under paragraph (a), clause (3).

(d) A service cha. ge may be imposed immediately on any dishonored check, regardless of mailing a notice of dishonor if written notices of the service charge was conspicuously displayed on the premises when the check was issued. The service charge may not exceed $20, except that if the payee uses the services of a law enforcement agency to obtain payment of a dishonored check, a service charge of up to $25 may be imposed if the service charge is used to reimburse the law enforcement agency for its expenses. A

~~payee may impose only one service charge under this paragraph for each dishonored check.~~

~~(c) This subdivision prevails over any provision of law limiting, prohibiting, or otherwise regulating service charges authorized by this subdivision, but does not nullify charges for dishonored check, which do not exceed the charges in paragraph (d) or the actual cost of collection, but in no case more than $30, or terms or conditions for imposing the charges which have been agreed to by the parties to an express contract.~~

(a) A service charge of up to $20, or actual costs of collection not to exceed $30, may be imposed immediately on any dishonored check regardless of mailing a notice of dishonor, if notice of the service charge was conspicuously displayed on the premises when the check was issued. If a law enforcement agency obtains payment of a dishonored check, a service charge not to exceed $25 may be imposed if the service charge is retained by the law enforcement agency for its expenses. Only one service charge may be imposed under this paragraph for each dishonored check.

(b) If the amount of the dishonored check is not paid within 30 days after the payee or holder has mailed notice of dishonor pursuant to section 609.535 and a description of the penalties contained in this subdivision, whoever issued the dishonored check is liable to the payee or holder of the check for:

(1) the amount of the check, the service charge as provided in paragraph (a), plus a civil penalty of up to $100 or

the value of the check, whichever is greater. The civil penalty may not be imposed until 30 days following the mailing of the notice of dishonor. A payee or holder of the check may make a written demand for payment of the civil liability by sending a copy of this section and a description of the liability contained in this section to the issuer's last know address. Notice as provided in paragraph (a) must also include notification that additional civil penalties will be imposed for dishonored checks for non-payment after 30 days;

(2) interest at the rate payable on judgments pursuant to section 549.09 on the face amount of the check from the date of dishonor; and

(3) reasonable attorney fees if the aggregate amount of dishonored checks issued by the issuer to all payees within a six-month period is over $1,250.

(c) This subdivision prevails over any provisions of law limiting, prohibiting, or otherwise regulating service charges authorized by this subdivision, but does not nullify charges for dishonored checks, which do not exceed the charges in paragraph (a) or terms or conditions for imposing the charges which have been agreed to by the parties in an express contract.

(d) A sight draft may not be used as a means of collecting the civil penalties provided in this section without prior consent of the issuer.

Minn. State. § 3-104. Form of Negotiable Instruments; "Draft"; "Check"; "Certificate of Deposit"; "Note"

(1) Any writing to be a negotiable instrument within this Article must

(a) be signed by the maker or drawer; and

(b) contain an unconditional promise or order to pay a sum certain in money and no other promise, order, obligation or power given by the maker or drawer except as authorized by this Article; and

(c) be payable on demand or at a definite time; and

(d) be payable to order or to bearer.

(2) A writing which complies with the requirements of this section is

(a) a "draft" ("bill of exchange") if it is an order;

(b) a "check" if it is a draft drawn on a bank and payable on demand;

(c) a "certificate of deposit" if it is an acknowledgment by a bank of receipt of money with an engagement to repay it;

(d) a "note if it is a promise other than a certificate of deposit.

(3) As used in other Articles of this Act, and as the context may require, the terms "drat", "check", "certificate of deposit" and "note" may refer to instruments which are not negotiable within this Article as well as to instruments which are so negotiable.

(L.1962, c.553.)